MBf Factors Sdn Bhd v Tay Hing Ju (t/a New General Trading)

HIGH COURT (MUAR) — CIVIL SUIT NO 23-5 OF 2000
JEFFREY TAN J
19 NOVEMBER 2001

Civil Law Act *— Assignment — Absolute assignment — Whether factoring agreement could be absolute assignment within meaning of s 4(3) of Civil Law Act 1956 — Conditions for statutory assignment — Whether assignee and assignor treated assignment as absolute assignment or by way of charge only*

Equity *— Assignment — Assignment of right to receive payment — Factoring agreement — Whether factoring agreement was absolute assignment or by way of charge only — Civil Law Act s 4(3)*

By a recourse factoring agreement ('the factoring agreement') entered into between one Gan Siong Pew ('Gan') as assignor and the plaintiff as assignee, Gan assigned all his book debts to the plaintiff. Gan then served a notice of assignment on the defendant and informed the latter that by virtue of the assignment, the defendant was indebted to the plaintiff in the sum of RM584,873.88. This was the plaintiff's appeal to the judge in chambers against the decision of the senior assistant registrar ('the SAR') dismissing the plaintiff's application to enter summary judgment against the defendant under O 14 of the Rules of the High Court 1980 ('the RHC'). The defendant's defence was that he was not indebted to Gan and that the invoices tendered towards proof of his purported debt were forged by Gan. In his affidavit, the defendant contended that he had lent Gan some pre-signed blank cheques to enable Gan to overcome his financial difficulties and that a cheque for RM30,000 that had been purportedly issued by the defendant to the plaintiff was one of the pre-signed blank cheques given to Gan. The defendant had reported Gan's fraud to the police.

Held:

(1) The effect of s 4(3) of the Civil Law Act 1956 ('the Act') was that an assignment shall be, and be deemed to have been, effectual in law to pass and transfer not only the legal right to the debt or chose in action but also the right to sue upon it in the assignee's own name if: (a) the assignment was absolute and did not purport to be by way of charge only; (b) the assignment was in writing under the hand of the assignor; and (c) express notice in writing thereof had been given to the debtor or trustee ('the three conditions'). As such, where the three conditions had been fulfilled, a finance house was able to sue the debtor in its own name to recover the amount owing (see pp 545F–546A).

(2) An assignment complying with s 4(3) of the Act was described as a 'statutory assignment' and an assignment not complying with s 4(3) of the Act was a 'non-statutory assignment' (see p 546C);

Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd [1994] 1 MLJ 628 followed and *Arab Malaysian Merchant Bank Bhd v Esso Production (M) Inc* 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1583, 1589 and 1591 distinguished.

(3) An assignment meant the transfer of contractual rights and liabilities to a third party with or without concurrence of the other party to the contract. An assignment of debt was absolute if no conditions were attached (see p 546H–I).

(4) There was no law to say that a factoring agreement could not be an absolute assignment within the meaning of s 4(3) of the Act. Based on the terms of the factoring agreement and the notice of assignment in the instant case, it was clear that the plaintiff and Gan treated the same as an absolute assignment, not purporting to be by way of charge only (see p 548D–F).

(5) The assignment was absolute in the sense that Gan intended to pass to the plaintiff absolutely the beneficial interest as well as all the rights, title and remedies of enforcing them. The use of the words 'absolutely assigned' in the notice of assignment wholly reflected that intention. Further, the defendant too had proceeded on the basis that Gan had absolutely assigned Gan's debts to the plaintiff (see p 550D–E).

(6) If the defendant had signed the cheques in blank and had given them to Gan to enable Gan to overcome his financial difficulties, the defendant would have, by the delivery of the pre-signed blank cheques, given prima facie authority to Gan or any other person in possession of the cheques to complete the cheques in any way he thought fit. Therefore, the defendant could not contend fraud (see pp 550I–551A, C).

(7) There were grounds to believe that the defence was a sham. However, so as not to shut out the defendant who had lodged a police report in respect of the alleged fraud, conditional leave was given to the defendant to defend, the condition being the payment into court of the whole sum claimed (see p 552A).

[Bahasa Malaysia summary

Melalui suatu perjanjian 'recourse factoring' ('perjanjian tersebut') di antara Gan Siong Pew ('Gan') sebagai penyerahhak dan plaintif sebagai pemegang serahhak, Gan menyerahhak segala hutang bukunya kepada plaintif. Gan kemudiannya telah menyampaikan notis penyerahan hak ke atas defendan dan telah memberitahu bahawa melalui penyerahan hak tersebut, defendan berhutang kepada plaintif sebanyak RM584,873.88. Ini merupakan rayuan plaintif kepada hakim dalam kamar terhadap keputusan penolong kanan pendaftar ('PKP') yang menolak permohonan plaintif untuk memasukkan penghakiman terus terhadap defendan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pembelaan defendan adalah

bahawa beliau tidak berhutang kepada Gan dan invois-invois yang dijadikan keterangan hutang yang dikatakan tersebut telah dipalsukan oleh Gan. Di dalam afidavitnya, defendan menyatakan bahawa beliau telah meminjam Gan beberapa cek kosong yang telah ditandatangan untuk membolehkan Gan mengatasi masalah kewangannya dan bahawa cek untuk RM30,000 yang dikatakan telah dikeluarkan oleh defendan kepada plaintif merupakan salah satu daripada cek kosong yang telah ditandatangani yang telah diberi kepada Gan. Defendan telah melaporkan fraud Gan kepada polis.

Diputuskan:

(1) Kesan s 4(3) Akta Undang-Undang Sivil 1956 ('Akta tersebut') adalah penyerahan hak tersebut adalah, dan dianggap, berkesan di sisi undang-undang untuk memindah bukan sahaja hak undang-undang kepada hutang tersebut ataupun hak dalam tindakan, tetapi juga untuk mendakwa ke atasnya dengan menggunakan nama pemegang serahhak jika: (a) penyerahan hak tersebut mutlak dan tidak melalui gadaian sahaja; (b) penyerahan hak tersebut melalui tulisan oleh penyerahhak; (c) notis nyata dalam tulisan telah diberi kepada penghutang atau pemegang amanah ('tiga syarat tersebut'). Oleh itu, di mana tiga syarat tersebut telah dipenuhi, suatu badan kewangan boleh mendakwa penghutang menggunakan namanya sendiri untuk mendapatkan jumlah yang belum dijelaskan (lihat ms 545F–546A).

(2) Penyerahan hak yang menurut s 4(3) Akta tersebut telah dikatakan sebagai satu 'statutory assignment' dan penyerahan hak yang tidak menurut s 4(3) Akta tersebut merupakan satu 'non-statutory assignment' (lihat ms 546C); *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* [1994] 1 MLJ 628 diikut dan *Arab Malaysian Merchant Bank Bhd v Esso Production (M) Inc* 3 *Mallal's Digest* (4th Ed, 1994 Reissue) perenggan-perenggan 1583, 1589 dan 1591 dibeza.

(3) Penyerahan hak bermaksud pemindahan semua hak dan liabiliti kontraktual kepada satu pihak ketiga tidak kira sama ada terdapat persetujuan pihak dalam kontrak tersebut. Penyerahan hak hutang adalah mutlak sekiranya tidak terdapat syarat-syarat untuk dipenuhi (lihat ms 546H–I).

(4) Tidak terdapat undang-undang yang menyatakan bahawa satu perjanjian 'recourse factoring' tidak boleh menjadi suatu penyerahan hak mutlak di bawah s 4(3) Akta tersebut. Berdasarkan terma-terma perjanjian 'recourse factoring' tersebut dan notis penyerahan hak di dalam kes ini, jelas bahawa plaintif dan Gan melayan perjanjian tersebut sama seperti suatu penyerahan hak mutlak, dan tidak dianggap sebagai gadaian sahaja (lihat ms 548D–F)

(5) Penyerahan hak tersebut mutlak jika dilihat bahawa Gan berniat memberikan plaintif secara mutlak kepentingan benefisial dan

juga segala hak, hakmilik dan remedi untuk penguatkuasaannya. Pengunaan perkataan 'absolutely assigned' dalam notis penyerahan hak memang mencerminkan niat tersebut. Selain itu, defendan juga telah bertindak atas alasan bahawa Gan telah menyerah hak hutang beliau (Gan) kepada plaintif (lihat ms 550D–E).

(6) Jika defendan telah mengosongi cek-cek tersebut dan memberikannya kepada Gan untuk membolehkan Gan mengatasi masalah-masalah kewangan beliau, defendan telahpun, melalui penyampaian cek-cek kosong yang ditandatangani terlebih dahulu tersebut, memberikan kuasa prima facie kepada Gan atau sesiapa yang memiliki cek-cek tersebut untuk melengkapi cek-cek tersebut dalam apa jua cara yang difikirkan sesuai. Oleh itu, defendan tidak boleh menggunakan alasan fraud (lihat ms 550I–551A, C).

(7) Terdapat alasan untuk mempercayai bahawa pembelaan tersebut merupakan satu penipuan. Walau bagaimanapun, supaya tidak mengenepikan defendan yang telah membuat satu laporan polis atas fraud yang didakwa itu, kebenaran bersyarat diberikan kepada defendan untuk membela, syaratnya adalah bayaran kepada mahkamah jumlah wang yang dituntut (lihat ms 552A).]

Notes

For a case on absolute assignment, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2618.

For cases on assignment of right to receive payment, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1891–1893.

Cases referred to

Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd [1994] 1 MLJ 628 (folld)

Arab Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1583, 1589, 1591 (distd)

Arab-Malaysian Merchant Bank Bhd v Sin Hiap Huat Enterprise [1989] 2 CLJ 980 (refd)

Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray [1984] 1 Lloyd's Rep 21 (refd)

Barring v Corrie (1881) 2 B & Ald 137 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Chong Yoong Choy v UOL Factoring Sdn Bhd [1996] 1 MLJ 421 (refd)

Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd [1996] 2 MLJ 251 (refd)

London Joint Stck Bank, Ltd v Macmillan & Arthur [1918] AC 777 (refd)

Malayawata Steel Bhd v Government of Malaysia & Anor [1975] 1 MLJ 22 (refd)
Matchless, The (1882) 1 Hag Adm 97 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)
Public Finance Bhd v Scotch Leasing Sdn Bhd [1996] 2 MLJ 369 (refd)
Stevens v Biller (1884) 25 Ch D 31 (refd)
Tay Way Boon v Omar Marican Holdings Sdn Bhd & Ors [1991] 1 MLJ 122 (refd)
UMW Industries (1985) Sdn Bhd (formerly UMW (Malaya) Sdn Bhd v Ah Fook @ Chin Kim Fook [1996] 1 MLJ 365 (refd)
United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd [1988] 2 MLJ 297 (refd)

Legislation referred to

Bills of Exchange Act 1949 s 20(1)
Civil Law Act 1956 s 4(3)
Contracts Act 1950 s 131
Factors Acts 1823, 1825, 1844, 1877 [Eng]
Factors Act 1889 [Eng] ss 1, 2(1)
Law of Property Act 1925 [Eng] s 136
Rules of the High Court 1980 O 14
Sale of Goods Act 1957 ss 2, 27, 28, 29, 30

Chandrasegaram a/l Arunachalam Sinniah (*Ram Rais & Partners*) for the plaintiff.

Moy Saw Han (*Skrine*) for the defendant.

Jeffrey Tan J: This is the plaintiff's appeal to judge in chambers against the decision of the learned senior assistant registrar dismissing, on 5 July 2001, the application of the plaintiff, pursuant to O 14 of the Rules of the High Court 1980, for summary judgment against the defendant.

Basically, the plaintiff claims that one Gan Siong Phew (Gan) t/a Terry Industries, by a factoring agreement dated 29 April 1997 and entered between Gan as assignor and the plaintiff as assignee, had assigned all his book debts to the plaintiff, that Gan, by notice of assignment dated 30 April 1997, notified the defendant of his assignment, and, that the defendant, by reason of such assignment, is therefore indebted to the plaintiff in the sum of RM584,873.88. And basically the defendant contends in his defence, that he was not indebted to Gan, that the invoices towards proof of his so-called debt were all falsified by Gan, and that he had reported the fraud to the police.

Miss Moy Saw Han for the defendant, in her submission, thus sketched the defence. To begin with, Miss Moy concurred with Mr AS Chandrasegaram for the plaintiff that Gan was the sole proprietor of Terry Industries. Miss Moy accepted the existence of the factoring agreement dated 30 July 1997 and notice of assignment dated 30 July 1997. But Miss Moy contended that the defendant had not acknowledged any notice

of assignment. She said that the notice of assignment was a piece of blank paper when it was signed by the defendant, and the defendant's cheque for RM30,000 and payable to the plaintiff was a blank cheque when it was signed by the defendant. On that basis, Miss Moy contended, that the so called acknowledgement of the notice of assignment (see encl 5 exh HCH-3) and the cheque (see encl 15 exh HCH-2) were not that of the defendant.

Mr Chandrasegaram argued however that the factoring agreement had assigned Gan's book debts to the plaintiff, and that the plaintiff pursuant to the factoring agreement had furnished statements of accounts to the defendant. Mr Chandrasegaram contended that the defence is the fraud committed by a third party, which fraud, on the authority of *Arab-Malaysian Merchant Bank Bhd v Sin Hiap Huat Enterprise* [1989] 2 CLJ 980 and *Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd* [1996] 2 MLJ 251, is of no concern to the plaintiff as the plaintiff was not a party to the alleged fraud, and that there is no triable issue 'with the plaintiff'.

In reply, Miss Moy tendered the authorities of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 and *Public Finance Bhd v Scotch Leasing Sdn Bhd* [1996] 2 MLJ 369, and submitted that what was assigned was subject to all defects in the title of the assignor. The defendant protested (see encl 13 exhs A6–A8) to the plaintiff, against the statements of accounts. When the statement of accounts was received in early 1998, the defendant questioned Gan who admitted his fraud (see encl 13 exh A2). On 15 September 1998, the defendant reported Gan's fraud to the police (see encl 13 exh A4). The defendant was an innocent victim who had not taken the goods stated on the invoices nor owed any monies to Gan. Lastly, Miss Moy submitted that the assignment was an equitable assignment and not a legal assignment, and that Gan must be brought in as an additional defendant.

In response to the second last point made by Miss Moy, Mr Chandrasegaram tendered the authority of *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* [1994] 1 MLJ 628 and commented that a separate assignment was not necessary, which submission prodded Miss Moy to tender the further authority of *Arab Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc* 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1583, 1589 and 1591, and to respond that there must be a separate assignment.

The word 'factoring' comes from the word 'factor' who is 'a mercantile agent who in the ordinary course of business is entrusted with possession of goods or of the documents of title thereto' (*Halsbury's Laws of England* (4th Ed) para 712). 'A factor is an agent, but an agent of a different kind. He is an agent entrusted with the possession of goods for the purpose of sale' (*Stevens v Biller* (1884) 25 Ch D 31 at p 37, per Cotton LJ). 'A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he had not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them.

When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right therefore, that the principal should be bound by the consequence of such sale; amongst which, the right of setting-off a debt due from the factor is one' (*Barring v Corrie* (1881) 2 B & Ald 137 at p 148, per Holroyd J). '... a merchant buys and sells for his own direct mercantile profit, and the factor only buys and sells upon commission ... To be a factor, he must be empowered to sell by commission; and if not so empowered, he is not a factor, whatever else he may do' (*The Matchless* (1882) 1 Hag Adm 97 at pp 100–101, per Lord Stowell). 'But the operations of business intermediaries are now conducted in different ways than those in use in the nineteenth century ... (*Bowstead & Reynolds on Agency* (17th Ed) at paras 8–144).

Incidentally, the term 'mercantile agent' appears in the local statutes. By s 2 of the Sale of Goods Act 1957 ('the SoGA'), 'mercantile agent means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'. This definition has been taken from s 1 of the English Factors Act 1889. With regard to sales under the English Factors Act 1889, s 2(1) provides that:

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has no authority to make the same.

Chitty on Contract — Specific Contracts (27th Ed) paras 41–157 further imparts as follows:

> Section 2(1) of the Sale of Goods Act states that 'nothing in this Act affects ... the provisions of the Factors Acts ... enabling the apparent owner of goods to dispose of them as if he were their true owner'. The provision quoted above is therefore an important qualification of the *nemo dat quod non habet* rule. In order that a bona fide disponee of the goods without notice should be able to claim the benefit of it, five conditions must be satisfied; first, the person disposing of the goods must be a mercantile agent as defined by the Factors Act 1889, s 1(1); secondly, he must be in possession of the goods or of the documents of title to goods; thirdly, he must be in possession with the consent of the owner; fourthly, there must be a sale, pledge or other disposition of the goods by him; fifthly, he must dispose of the goods when acting in the ordinary course of business of a mercantile agent.

There is no specific Act in Malaysia on factors. But s 131 of the Contracts Act 1950 deals with the pledge of goods or of documentary title to goods by a person other than the owner thereof. And ss 27–30 of the SoGA specifically relate to the sale of goods by a person other than the owner, and read as follows:

A 27 Sale by person not the owner

(1) Subject to this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them, under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's B authority to sell:

Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the buyer acts in C good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

28 ...

29 ...

D 30 Seller or buyer in possession after sale

(1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the E previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Hence, the *nemo dat* rule or the equivalent maxim *assignatus utitur jure auctoris* is not exactly without qualification (see *Public Finance Bhd v Scotch Leasing Sdn Bhd* at p 379, where the Federal Court held that the operation F of the *nemo dat* rule to certain specific types of personal property not but including debts has been modified by statutes). A person dealing in good faith with mercantile agents of goods within the meaning of the SoGA is therefore protected, as merchants in England dealing in good faith with mercantile agents were protected by the Factors Acts 1823, 1825, 1844, G 1877 and are now protected by the Factors Act 1889.

The factoring service apparently evolved from the mercantile practice of factors. Benjamin's *Sale of Goods* (4th Ed) para 23–232 gives the following thumbnail sketch of a factoring service:

Some bankers and mercantile firms arrange for the financing of overseas sales H by providing factoring services. Under such an arrangement the firm or 'factor' takes over the books debts of the exporter on a non-recourse basis. It pays the exporter the price of goods shipped overseas against a duplicate of his invoice and collects the price from the buyer through correspondents operating in his country. The factor takes over the risk of bad debts. In certain cases the factor may also be prepared to advance to the exporter up to 90%. Of the price of goods before shipment. A specific advantage from the I exporter's point of view is that upon the engagement of a factor he is able to dispense with the need of having his own sales collections and accounting departments.

The use of factoring services is not confined to overseas sales; they are used widely for the finance of inland transactions.'

Bullen & Leake & Jacob's *Precedents of Pleadings* (14th Ed) Vol 1 at p 353, has a longer exposition on factoring service:

> Under a conventional factoring agreement, the finance company agrees to provide a factoring service under which a dealer assigns his commercial debts to the finance company in return for the immediate payment of a percentage of their value. The dealer agrees to serve notices of assignment upon his customers (the debtors). It is then for the finance house to collect the debts. As the legal assignee of the debt, the finance company is able to sue the debtors in his own name to recover the amount owing, thanks to the terms of the Law of Property Act 1925. When a customer pays the full value of the debt, the finance house either keeps the balance as payment, or accounts to the dealer for the balance but keeps a percentage as a commission.
>
> The agreements are designed to minimize the exposure of the finance company to the risk of non-payment by the customer. Thus, it is a wise precaution for the finance company to ensure the debt is not assigned until the dealer has performed his contract with his customer by delivering the goods or services. The customer is permitted to raise by way of a defence those matters which he could have raised as a defence if the claim had been brought by the dealer from whom he purchased the goods or services. In such cases, the agreement may permit the finance company to call for a re-assignment of the debt and the repayment of sums that it has already paid the dealer. The dealer is then left to proceed against his customer. In some cases, the dealer agrees to indemnify the finance company where the customer fails to pay by reason of the dealer's default in the contract of supply.
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> The finance company's direct right of action against the debtor depends upon the service of a notice of assignment. Failure to serve a notice of assignment amounts to a defence for the customer but should not render the dealer liable under the terms of the factoring agreement.

In England, a finance house is able to sue the debtors in his own name to recover the amount owing by reason of s 136 of the Law of Property Act 1925 ('the LPA 1925'), which reads:

> (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice —
>
> (a) the legal right to such debt or thing in action
>
> (b) the legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor.
>
> Provided that if the debtor, trustee or other person liable in respect of such debt or thing in action has notice —
>
> (a) that the assignment is disputed by the assignor or any person claiming under him; or
>
> (b) of any other opposing or conflicting claims to such debt or thing in action;

A he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

Chitty on Contract — Specific Contracts (ibid at para 19–003 understands the effect of s 136 of the LPA 1925 as follows:

B It will be seen that, in order that the section may apply, three conditions must be fulfilled: (i) the assignment must be absolute and not purport to be by way of charge only; (ii) it must be in writing under the hand of the assignor; (iii) express notice in writing thereof must be given to the debtor or trustee.

C The general effect of the section is to allow the assignee to sue the debtor in his own name instead of, as previously, having to sue in the name of the assignor and perhaps having to go to a court of equity to compel his joinder in the action. The section 'is merely machinery: ... it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the assignor's name, but only where he could so sue'.

D In Malaysia, the assignment of any debt or other chose in action is governed by s 4(3) of the Civil Law Act 1956 ('the CLA') which reads as follows:

Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive
E or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge
F for the same, without the concurrence of the assignor.

It will be seen, that s 4(3) of the CLA may apply if the same three conditions applicable to s 136 of the LPA 1925 are fulfilled: (i) the assignment must be absolute and not purport to be by way of charge only; (ii) it must be in writing under the hand of the assignor; (iii) express notice in writing thereof
G must be given to the debtor or trustee. And where it applies, s 4(3) of the CLA provides that the assignment 'shall be, and be deemed to have been, effectual in law ... to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor'. The effect of s 4(3) of the CLA is that an
H assignment fulfilling all three conditions 'shall be, and be deemed to have been, effectual in law ... to pass and transfer' not only the legal right to the debt or chose in action' but also 'the right to sue upon it in the assignee's own name' (*UMW Industries (1985) Sdn Bhd (formerly UMW (Malaya) Sdn Bhd v Ah Fook @ Chin Kim Fook* [1996] 1 MLJ 365, per Chong Siew Fai CJ). Where s 4(3) of the CLA applies, the assignor is allowed to sue the
I debtor in his own name instead of having to sue in the name of the assignor and perhaps having to go to a court to compel his joinder in the action. Thus, the position is the same as in England — where all three conditions

have been fulfilled, a finance house is able to sue the debtors in his own name to recover the amount owing. A

An assignment complying with s 4(3) of the CLA has also been described as a 'statutory assignment' (see *Public Finance Bhd v Scotch Leasing Sdn Bhd* at p 381, per Peh Swee Chin SCJ). An equitable assignment is an assignment allowed by equity but not common law (*Public Finance Bhd v Scotch Leasing Sdn Bhd* at p 381). But the assignment of a debt is now expressly permitted by written law. Hence, it would not be apposite to describe an assignment not complying with s 4(3) of the CLA as an equitable assignment, other than as a convenient term to denote an assignment not fulfilling the conditions as laid down in s 4(3) of the CLA (for an analogy, see *Public Finance Bhd v Scotch Leasing Sdn Bhd* at p 386 para H); see also *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* at p 629, where Abdul Malek J (as he then was) held that an equitable assignment is an assignment that does not comply with s 4(3) of the CLA. Since an assignment complying with s 4(3) of the CLA is described as a statutory assignment, then an assignment not complying with s 4(3) should be more aptly described as a non-statutory assignment. B C D

According to the Federal Court in *Public Finance Bhd v Scotch Leasing Sdn Bhd*, per Peh Swee Chin SCJ, 'the validity of [an] assignment is not affected by any failure to comply with the requirements as laid down in s 4(3) of the CLA ...' (see p 381C; see also *UMW Industries (1985) Sdn Bhd v Ah Fook @ Chin Kim Fook* at p 385, where Chong Siew Fai CJ said that 'in as much as concerning the validity of an equitable assignment, notice to the debtor is not necessary' ...) 'if notice is not given, the assignee must give credit for any payment made to the assignor by the debtor' (see p 381 para F), and, '... once a notice of assignment ... has reached [the debtors] ... the entitlement of the assignee to the debts in question would be incontestable against the assignee by anybody else including a subsequent so-called bona tide buyer for value without notice ...' (see p 383F; see also *Arab Malaysian Merchant Bank Bhd v Sin Hiap Huat Enterprise*, where it was held by Siti Norma Yaakob J (as she then was) that 'the law is that the customer's duty to pay the factor arises when he receives notice of the assignment'). Indeed, *Freddy R Salinger's Factoring Law and Practice*, at pp 131–133 (cited with approval in *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* at pp 629–630), says that the difference between a statutory and non-statutory assignment is 'purely procedural': 'the assignee has the right to sue in his own name alone for recovery from the debtor only if the assignment is legal [in the sense that it complies with the conditions of the Act]; otherwise proceedings should be in the joint names of the assignor and the assignee'. E F G H

The first condition of a statutory assignment is that the assignment must be absolute. An assignment 'means the transfer of contractual rights and liabilities to a third party with or without the concurrence of the other party to the contract' (see *United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd* [1988] 2 MLJ 297, per Seah SCJ). An assignment of a debt is absolute if no conditions are attached (see *Tay Way Boon v Omar Marican Holdings Sdn Bhd & Ors* [1991] 1 MLJ 122, where it was held by Mohamed I

A Dzaiddin J (as he then was) that the assignment was absolute as the assignor had assigned all that was due to him), or 'one that purports to pass the entire interest of the assignor in the chose in action' (see *UMW Industries (1985) Sdn Bhd v Ah Fook @ Chin Kirn Fook* at p 383, per Chong Siew Fai CJ). It is not absolute if conditions are attached (see *Malayawata Steel Bhd v Government of Malaysia & Anor* [1975] 1 MLJ 22 at p 24, where it was held
B by Mohamad Azmi J (as he then was) that 'an assignment may not be treated as absolute if the assignor retains any beneficial interest in the subject matter of the chose in action assigned or if the extent of what is assigned can be determined only upon an enquiry as to the state of accounts between the parties concerned').

C Less clear however is whether a factoring agreement is just a 'facultative agreement'. In *Arab Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc*, Zakaria Yatim J (as he then was) held that the factoring agreement in question was not an assignment but a facultative agreement, 'because, although the client is bound by the agreement to offer every debt arising from sales in the normal course of its business, the factor may accept or decline to
D accept any debt'. The pertinent clauses of that agreement provided:

> 1 The client hereby agrees to offer to sell to the bank ... all debts from time to time owing to the client by customers of the client ... arising out of credit sales or otherwise ...
>
> 2 The bank may in its absolute discretion after making such enquiries as it
E deems fit accepts any of the debts offered to the bank by communicating its acceptance...to the client ...
>
> 15 The client shall whenever requested by the bank in writing to do so forthwith at the client's cost, execute stamp and deliver to the bank a deed in a form approved by the bank assigning to the bank any purchased debt, together with the benefit of all guarantees or other securities for or
F in respect of the same and shall if requested by the bank forthwith give notice in writing of any such assignment to any customer whose debt is thereby assigned.

And his Lordship held that 'it is implicit in the factoring agreement that the assignment is to be done by a separate act' (see p 992).

G But Abdul Malek Ahmad J (as he then was) held in *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* (which dealt with a factoring agreement in terms identical to *Arab Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc*) that the factoring agreement was the actual assignment of all debts, that a separate deed of assignment was not necessary, that a deed of assignment was only necessary when so requested
H by an assignee, and that the factoring agreement did not make it mandatory. On appeal (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*, the judgment of Zakaria Yatim J in *Arab Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc* was relied upon in support of the argument that the factoring agreement was not an assignment at all, the
I Federal Court per Gopal Sri Ram JCA had this to say at p 349:

> Having read the judgment in that case (which dealt with an agreement in terms identical to the factoring agreement in the instant appeal) we are left in

doubt as to the correctness of the decision. But we need not, because the facts of the present case, go into that question in great detail. A

In the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption — an erroneous assumption of law — that the factoring agreement was indeed a good and valid assignment. The respondent's letter to the appellant of 14 February 1990, which we have earlier reproduced, is a document in point. The letter says that there has been an assignment under the factoring agreement. It was open at that stage for the appellant to dispute the construction which the respondent placed upon that agreement. But it did not do so. Instead it chose to go along with the respondent's interpretation of the document. Can it now say otherwise? We do not think it can. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the document. B C

Gopal Sri Ram JCA clarified in *Chong Yoong Choy v UOL Factoring Sdn Bhd* [1996] 1 MLJ 421, that *Boustead v Arab-Malaysian Merchant Bank* was a case 'in which the doctine of estoppel was invoked to lend commercial efficacy to a factoring agreement. But the term 'an erroneous assumption of law' in the Federal Court's finding, in the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption — an erroneous assumption of law — that the factoring agreement was indeed a good and valid assignment', which unfortunately also reads that in law a factoring agreement cannot be a good and valid assignment, was not clarified. But it must have been a finding 'based on the particular case' (see *Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd* at p 261, where Kamalanathan Ratnam JC (as he then was) held it was a finding based on the particular case). In the first place, there is no law to say that a factoring agreement cannot be an absolute assignment within the meaning of s 4(3). Furthermore, ' ... it seems clear from the authorities ... whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself' (*Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 at p 270, per Seah FJ). D E F

The pertinent clauses of the instant instrument, the 'Recourse Factoring Agreement', read as follows: G

3.1 The firm offers to sell its debts by delivering to MBf a duly completed offer together with the original and one copy of each invoice and other supporting documentation as MBf may require and shall not offer any debt for purchases or collection to any other person, firm or company or otherwise deal with any debt without the prior written consent of MBf. H

3.3 Acceptance of any debt offered to MBf will be deemed to take place upon MBf I crediting the firm's account with the value of the debt or debts purchased.

3.7 Without prejudice to the efficacy of the equitable assignment created pursuant to this agreement, the firm will at the request of MBf, execute, stamp and deliver to MBf a deed, in a form approved by MBf, legally assigning to MBf any purchased debt together with the benefit of all I

guarantors or other securities for or in respect of the same. If requested by MBf the form will also give notice in writing of any such assignment to any debtor where a debt is thereby assigned.

And so far as the plaintiff and Gan were concerned, that 'Recourse Factoring Agreement' was an absolute assignment. That was the construction placed by the plaintiff and Gan upon that 'Recourse Factoring Agreement' was clearly stated in the notice of assignment, which is now reproduced below:

Terry Industries
KS-2, Kg Sawah, Paya Redan, 84600 Pagoh
Muar, Johore.

Tel & Fax: 06-976657 (0)
Your Ref: Date: 30/4/97
Our Ref:

Dear Sirs

New General Trading
No 387 & 388, Jalan Sekela
Grisek, 84700 Muar
Johore

Re: Notice of Assignment of Debts

We are pleased to advise that we have acquired the services of MBf Factors Sdn Bhd who are specialists in providing factoring and sales ledger maintenance services.

As from today, all future debts including those outstanding as detailed in the Statement attached will [be] absolutely assigned to and hence become payable to:

MBf Factors Sdn Bhd
20th Floor Wisma MCA
Jalan Ampang
PO Box 11391
50744 Kuala Lumpur
Tel: 03–2619277 (12 lines)

Please note that a good discharge of your indebtedness can only be obtained by payment to MBf Factors Sdn Bhd and we confirm that we have no claims against you for such payments. Until MBf Factors Sdn Bhd advise you otherwise in writing all payments must be made to them.

All amounts due to you (if any) will be paid separately by us. No contra should be taken against amounts due to us without the prior written consent of MBf Factors Sdn Bhd and that we confirm there is no contra arrangement of any sort between ourselves.

Any objections to any invoices or its terms must be reported to MBf Factors Sdn Bhd within 14 days in writing after receipt of such invoices. For goods returned, it would be appreciated if you could forward a copy of the Debit Note to MBf Factors Sdn Bhd. Credit Notes-issued by us are subject to MBf Factors Sdn Bhd's consent in writing duly given by MBf Factors Sdn Bhd crediting your account (and reflected as such in the monthly Statement of Account) with the credit notes. They (credit notes) would then be forwarded to you by MBf Factors Sdn Bhd. This would enable MBf Factors Sdn Bhd to maintain an accurate and up to date sales ledger.

Should you have any queries, please do not hesitate to contact us or MBf Factors Sdn Bhd.

Yours faithfully, A
Terry Industries

We acknowledge receipt of the above and confirm the current balance outstanding of RM404971.83 is correct.

NEW GENERAL TRADING
Sgd illegible B
... ...
Gan Siong Phew
(Sole-Proprietor)
Sgd illegible
... ...
Authorized Signatory & Go's Rubber Stamp) C
Name Tan Hong Yu (Sole-Proprietor)

Hence, it would certainly appear that both the plaintiff and Gan proceeded upon the basis that the 'Recourse Factoring Agreement' was an absolute assignment. Indeed, the 'Recourse Factoring Agreement' was an absolute assignment not purporting to be by was of charge only, of all current and future debts, within the meaning of s 4(3) of the CLA. The assignment, D quite clearly, was in terms absolute in the sense that Gan intended to pass to the plaintiff absolutely the beneficial interest as well as all the rights, title, and remedies of enforcing them. The use of the words 'absolutely assigned' in the notice of assignment wholly reflected that intention (see *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* at p 271, where Seah E FJ held that the assignment was 'intended in point of form, to be an absolute assignment because of the use of the word 'absolutely' in cl 1 [of the assignment]'). It would also appear that the defendant proceeded as well on the basis that Gan had absolutely assigned his (Gan) debts to the plaintiff. Otherwise, the cheque of the defendant in the sum of RM30,000 and payable to the plaintiff (see encl 15 exh HCH-2) would not be with the F plaintiff. The defendant was not a debtor of the plaintiff, if not for the 'Recourse Factoring Agreement'. Reasonably, the only deduction to be drawn from the fact that the aforesaid cheque of the defendant was with the plaintiff, has to be that the defendant had taken cognizance and acted on the notice of assignment.

G

The defendant contended that the aforesaid cheque was a blank cheque when it was signed by the defendant. But is that mere assertion capable of belief? Reasonably, no drawer of a cheque would sign a blank cheque. Thus, it is not reasonable to believe that the defendant signed a blank cheque. The defendant contended in para 7 of his affidavit affirmed on 5 November 1999 (encl 12), 'Gan telah meminjam berapa keping cek daripada saya dan H telah menulis sendiri penerima dan jumlah wang yang hendak dibayar. Ia adalah satu amalan biasa di antara Gan dan saya untuk meminjam cek kosong kepada Gan yang menghadapi masalah kewangan pada masa-masa tertentu'. But that para 7 only divulged that the defendant was not such an 'innocent victim' as he was made out to be. For if it was true that there was a usual diabolical practice between the defendant and Gan that the I defendant would lend his blank cheques to Gan to enable Gan to overcome his financial difficuties, then the defendant, by his delivery of his signed

A cheques to Gan, had given his prima facie authority to Gan or other person in possession of it to fill up the omission in any way he thinks fit (see s 20(1) of the Bills of Exchange Act 1949). Furthermore, it must have crossed the mind of the defendant, if indeed he 'lent' his blank cheques to Gan to enable him to overcome his (Gan) financial difficulties, that his cheques, if indeed 'lent' to Gan to enable him to overcome his (Gan) financial difficulties, B would in all probability be negotiated and so could be accepted by an innocent holder or bearer for value. Besides, 'it is well settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent' (*London Joint Stck Bank, Ltd v Macmillan & Arthur* [1918] AC 777 at p 811, per C Lord Finlay). The defendant could not contend fraud.

The defendant related that his signature on the notice of assignment arose in the following circumstances: 'Saya menegaskan bahawa Gan telah dengan jujur, menipu dan dengan cara salah nyata frod menyuruh saya menandatangani satu surat kosong dengan memberitahu saya bahawa surat kosong tersebut adalah untuk membolehkan firmanya Terry Industries, D untuk membuka satu akaun bank. Saya telah menandatangani surat kosong tersebut dengan kepercayaan bahawa ianya adalah untuk membolehkan Terry Industries untuk membuka satu bank akaun'. There is a saying, that everyman is a fool sometimes, but none at all times. But here, the defendant would want it to be believed that he signed a blank cheque to enable Gan to E overcome his (Gan) financial difficulties, and signed a blank piece of paper to enable Gan to open a bank account. But how could that incredulous story, which made no attempt even to logically explain how a blank piece of paper with the defendant's signature could enable Gan to open a bank account, be believed? There is a cheque which supports the deduction that the notice of assignment must have been received, and a notice of F assignment which accounts for the plaintiff's possession of the cheque. Admittedly, there is Gan's statutory declaration conveniently saying that he (Gan) made out the cheque and the notice of assignment in present form. But even if Gan's statutory declaration contains any truth, it still remains that the filling in of the omissions was only possible because the defendant had not taken any care in the mode of drawing the cheque and had G knowingly delivered inchoate instruments to Gan. The defendant was no babe in the woods. Being a sole proprietor of his own business, he should know the purport and effect of his simple signature on documents. Nope, even if Gan's statutory declaration contains any truth, the innocent victim was the plaintiff.

H 'It is trite that the mere assertion in an affidavit of a given situation does not, *ipso facto*, provide leave to defend, since the defendant must satisfy the court that he has a fair or reasonable probability of showing a real or bona fide defence, ie that his evidence is reasonably capable of belief (per Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21 at p 28' *(The Supreme Court Practice 1997* para 14/3–4/8). I 'A condition of paying some or all of the money or damages into court, or giving security, is imposed where there is a good ground in the evidence for believing that the defence set up is a sham defence or the Master 'is

prepared very nearly to give judgment to the plaintiff' (*The Supreme Court Practice* ibid para 14/3–4/15). In the present case, there are certainly grounds to believe that the defence is a sham and to doubt the bona fides of the defence. There is no substance in the defence. Anyway, so as not to shut out the defendant who after all had reported the so-called fraud to the police, conditional leave is given to the defendant to defend, the condition being the payment into court of the whole sum claimed (that sum was only imposed after the defendant had declined to accept the invitation of the court, to suggest a sum as would make fulfillment of that condition by the defendant not impossible) within a month from date hereof.

Order accordingly.

Reported by Lim Lee Na